Office - Supreme Court, U.S.
FILED
JUL 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, et al.,

Petitioners,

v.

DANIEL DONNELLY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE COALITION FOR RELIGIOUS LIBERTY AND THE FREEDOM COUNCIL, AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

JOHN W. WHITEHEAD
P. O. Box 409
Manassas, Virginia 22110
(703) 670-8580

JAMES J. KNICELY
707 East Main Street
Richmond, Virginia 23219
(804) 788-8605

Participating Attorneys for
The Rutherford Institute
P. O. Box 510
Manassas, Virginia 22110

Attorneys for Amici Curiae
Coalition for Religious Liberty
5555 North Federal Highway
Ft. Lauderdale, Florida 33308

The Freedom Council
P. O. Box 64323
Virginia Beach, Virginia 23464

TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Statement of Facts 3

The Question to Which This Brief is Addressed 4

Summary of Argument 4

Argument

I. The City's Use Of A Life-Sized Nativity Scene As Part Of A City-Sponsored Outdoor Christmas Display Does Not Conflict With The Intentions Of The Framers Of The First Amendment Of The United States Constitution Concerning The Separation Of Church And State 6

A. The Climate Of Our Revolutionary Government Was One Of Accommodation To Religion 6

B. The Framers Of The First Amendment Sponsored And Participated In Official Observances Having A Far Greater Religious Impact Than The City's Creche Display 8

II. The Court Of Appeals Applied The Wrong Standard Of Review 11

III. The Creche Is Part Of A Cultural-Historical Display Announcing The Christmas Holiday And Does Not Violate The Establishment Clause 13

A. The Creche, As Part Of The City's Christmas Display, Serves A Secular Legislative Purpose 13

B. The Primary Effect Of The Creche, As Part Of The City's Christmas Display, Neither Advances Nor Inhibits Religion 15

C. There Is No Entanglement Issue In This Case 17

Conclusion 18

TABLE OF CASES

Cases

Page

Allen v. *Hickel*, 424 F.2d 944 (D.C.Cir. 1970) 13, 15

Allen v. *Morton*, 333 F. Supp. 1088 (D.D.C. 1971) 15

Allen v. *Morton*, 495 F.2d 65 (D.C.Cir. 1973) 15, 17

Citizens Concerned for Separation of Church and State v. *City and County of Denver*, 508 F. Supp. 823 (D.Colo. 1981) . 15, 17

Citizens Concerned for Separation of Church and State v. *City and County of Denver*, 526 F. Supp. 1310 (D.Colo. 1981) 15, 17

Donnelly v. *Lynch*, 691 F.2d 1029 (1st Cir. 1982) . . 2, 8, 12, 17, 18

Florey v. *Sioux Falls School District*, 619 F.2d 1311, (8th Cir. 1980), cert. denied, 449 U.S. 987 (1980) 14, 15

Larkin v. *Grendel's Den, Inc.* ___ U.S. ___, 74 L.Ed. 2d 297 (1982) 13

Larson v. *Valente*, 456 U.S. 228 (1982) 5, 11

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 5, 11, 12

McGowan v. *Maryland*, 366 U.S. 420 (1961) 14

O'Hair v. *Andrus*, 613 F.2d 931 (D.C.Cir. 1979) 16, 19

School District of Abington Township v. *Schempp*, 374 U.S. 203 (1963) 18

Stone v. *Graham*, 449 U.S. 39 (1980) 5, 11, 12, 14

Torcaso v. *Watkins*, 367 U.S. 488 (1961) 18

Widmar v. *Vincent*, 454 U.S. 263 (1981) 16

Zorach v. *Clauson*, 343 U.S. 306 (1952) 12

Other Sources

Comment, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 41 Yale L. J. 1196 (1982) . 17

Page

Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 Ohio N. U. L. Rev. 329 (1981) 18

T. Cooley, *Principles of Constitutional Law* (1980) 7

R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982) 9

H. Cox, *The Secular City* (1965) 19

Documents Illustrative of the Formation of the Union of American States (1927) 8

Fahy, *Religion, Education and the Supreme Court*, 14 Law & Contemp. Prob. 73 (1949) 7

Forkosch, *Religion, Education, and the Constitution—A Middle Way*, 23 Loyola L. Rev. 617 (1977) 18

Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 Harv. L. Rev. 513 (1968) 18

P. Kauper, *Civil Liberties and the Constitution* (1962) 19

R. Meyers, *Celebrations: The Complete Book of American Holidays* (1972) 8

P. Stokes and L. Pfeffer, *Church and State in the United States* (Rev. ed. 1964) 10

J. Story, *2 Commentaries on the Constitution of the United States* (2d ed. 1951) 593-95 7

Sutherland, *Due Process and Disestablishment*, 62 Harv. L. Rev. 1306 (1949) 7

19 *The Writings of Thomas Jefferson* (Memorial ed. 1904) 10

B. Weiss, *God and America's History: A Documentation of America's Religious Heritage* (Rev.ed. 1975) 20

J. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society (1897) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1256

DENNIS LYNCH, et al.,

Petitioners,

v.

DANIEL DONNELLY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE COALITION FOR RELIGIOUS LIBERTY AND THE FREEDOM COUNCIL, AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI CURIAE[1]

The Freedom Council and the Coalition for Religious Liberty are gravely concerned about the implications for religious tolerance raised by Court of Appeals' decision in this case. Christmas has been observed in America continuously—albeit not universally—from the early days of the first settlement at Jamestown, Virginia. Although the legal observance of the Christmas holiday is not directly challenged here, the Court's disposition of this case will

[1] Counsel of record to both parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

affect many centuries-old American customs and traditions observed as part of the Christmas holiday in thousands of communities in every state of the Union. Moreover, it will affect the display of religious symbols in all aspects of public life.

The Court of Appeals would sanitize public announcement of the Christmas holiday by "shearing it of all its religious trappings." *Donnelly* v. *Lynch*, 691 F. 2d 1029, 1038 (1st Cir. 1982) (Campbell, J. dissenting). The Freedom Council and the Coalition for Religious Liberty are alarmed by the alluring appeal of such extreme logic. The principles of religious tolerance and freedom undergirding the First Amendment Religious Clauses should not be allowed to be undermined by an unrelenting dogma that would eradicate from public life every vestige, root and branch, of America's Judeo-Christian religious tradition.

The Freedom Council is a non-profit corporation organized to defend, restore, and preserve religious liberties guaranteed by the Constitution. With chapters in each of the 50 states, the Freedom Council is also affiliated with student groups on over 70 college campuses and with the Christian Broadcasting Network, currently the largest cable television network in the United States reaching over 20 million homes. The Freedom Council assists its chapters and associated organizations in addressing issues on the local, state and national levels that have a significant impact on First Amendment religious freedoms.

The Coalition for Religious Liberty is a coalition of Jewish, Roman Catholic and Protestant lawyers and lay persons headed by Dr. D. James Kennedy, Senior Minister of the 6,000-member Coral Ridge Presbyterian Church in Ft. Lauderdale, Florida. The Coalition was founded to educate the public on important issues affecting religious

liberties, to support efforts to promote religious liberty and toleration in American life and to oppose the use of law and the court system as a vehicle for imposing secular religion on American society.

Amici Curiae are represented by participating attorneys from The Rutherford Institute, a non-profit corporation named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. Through the efforts of its staff and affiliated local attorneys and lay persons, the Institute undertakes to assist litigants and participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* in this case have specialized in constitutional litigation, including the Religion Clauses of the First Amendment. Counsel John W. Whitehead has served as special constitutional consultant for the Center for Law and Religious Freedom of the Christian Legal Society, and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion Clauses. The Freedom Council and the Coalition believe the expertise of its counsel will be of assistance to the Court in this case. This brief is filed to provide the Court with the views of *Amici Curiae* on the issues in this case relating to the Establishment Clause of the First Amendment.

STATEMENT OF FACTS

Amici Curiae adopt by reference the facts presented in the Brief filed by petitioner with this Court. It should be emphasized that the creche appeared (1) in the overall context of City-sponsorship of several national holiday celebrations and (2) in the more limited context of one symbol among scores in a display that was part of a series of City-

wide events celebrating the Christmas holiday. The latter display announced the holiday season to business persons and shoppers in the commercial center of the City of Pawtucket. It appeared only temporarily during the Christmas season. It was placed on private property, with the creche situated amidst lighted Christmas trees, reindeer, snowmen, stars, a wishing well, a large lighted sign proclaiming "Seasons Greetings," a Santa's house inhabited by a live Santa and 21 figurines including a clown, dancing elephant, robot and teddy bear. The cost of the creche and costs incurred in connection with its display were *de minimus*, both in comparison to total cost of the several City displays and in comparison to the annual budget of the City. This setting and context are important in determining the purpose and effect of the display under the Establishment Clause of the First Amendment.

THE QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed first to the historical background of the Establishment Clause and the record of its Framers on state participation in religious observances and activities, and second to the legal analysis of whether the City's action in fact constitutes a violation of the Establishment Clause.

SUMMARY OF ARGUMENT

This Court has relied in prior cases upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious practices. Although the record of the

Framers' observance of Christmas is sparse, perhaps due to wide acceptance of the Christmas holiday among the sects by 1750, there is substantial historical evidence that the Framers actively sanctioned in their official capacities religious observances and activities having a far greater religious impact than the mere display of a creche in the midst of a secular holiday exhibit. The historical evidence regarding the Framers views should not be discarded when, as this Court has recognized, they played such a leading role in shaping the Constitutional guarantees of religious freedom. The Framers would have been appalled that the First Amendment could be utilized to prohibit the practice in question here.

In its determination below, the Court of Appeals erred by applying the wrong standard of review. Departing from the traditional tri-partite test found in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1974), the lower court applied the "strict scrutiny" standard found in *Larson* v. *Valente*, 456 U.S. 228 (1982). The latter standard is inappropriate in this case since *Larson* involved an explicit statutory classification affecting religious groups, whereas no such regime of state regulation or discrimination is present in this case. The fallacy of applying the *Larson* standard to this type of case is that the analysis inexorably leads to an adverse result. The proper standard is the tri-partite test found in *Lemon* which has been applied in other cases involving religious symbols. *See Stone* v. *Graham*, 449 U.S. 39 (1980).

Applying the *Lemon* tests, the creche, as part of the City's Christmas display, serves a secular legislative purpose. The creche and the other symbols in the display are traditional symbols that are part of the historical-cultural celebration of Christmas by the American people. The dominant message, and therefore the primary effect, of the display is not

to advance religion. Instead, the display advances a secular message announcing the Christmas holiday. In this context, there is no Establishment Clause violation. The decision of the Court of Appeals conflicts with both the intentions of the Framers of the First Amendment and with fundamental Constitutional principles and should therefore be reversed.

ARGUMENT

I.

The City's Use Of A Life Sized Nativity Scene As Part Of A City-Sponsored Outdoor Christmas Display Does Not Conflict With The Intentions Of The Framers Of The First Amendment Concerning The Separation Of Church and State.

From the nation's inception, our governments have encouraged and accommodated religion. This is most evident in the history of the revolutionary period and in official acknowledgement of and participation in certain religious observances during the period. There is a wealth of historical data illuminating the meaning of the First Amendment and the intent of the Framers in this regard. The record demonstrates that the Framers participated in and authorized religious observances and activities that had a far greater religious impact than display of the creche by the City. Thus, it is the Court of Appeals decision below, not the display in issue, that conflicts with long-standing First Amendment values.

A. The Climate Of Our Revolutionary Government Was One Of Accommodation To Religion.

From the references to the "Creator" in the Declaration of Independence to the drafting of the First Amendment, it is clear, in the words of the late Judge Charles Fahy, that

"[t]he climate of the American revolutionary period, including the period of constitutional development, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court,* 14 Law & Contemp. Prob. 73, 77 (1949). The focus of the Constitutional era was not the eradication of religion from public life. Instead, it was to ensure that religious values be accommodated without violating private rights of conscience. As Professor Arthur Sutherland has written, the history of church and state reveals "an intimate association between government and religion . . ." Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1306, 1318 (1949). Justice Joseph Story, who served on the United States Supreme Court from 1811 to 1845, wrote of this intimate relationship:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indigation . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, 2 *Commentaries on the Constitution of the United States* 593-95 (2d ed., 1851). *See also* T. Cooley, *Principles of Constitutional Law* 224 (1893).

Not only were the Framers concerned that religious expression, freedom and education be accommodated, they saw it as vital to the health of the nation. This was perhaps

most clearly demonstrated in the passage of the Northwest Ordinance of 1787 by a Congress composed of many of the drafters of the First Amendment and the Constitution. It reads:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. *Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.* (Emphasis supplied.)

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

B. The Framers Of The First Amendment Sponsored And Participated In Religious Observances Having A Far Greater Religious Impact Than The City's Creche Display.

Although Christmas was not observed universally in the 13 colonies, it was recognized or observed in both of the earliest Virginia and Massachusetts settlements and was, in the words of dissenting Judge Campbell, "an ingrained part of our culture." *Donelley* v. *Lynch*, 691 F.2d at 1038. The historical record of the Framers' views on the observance of Christmas is sparse, perhaps due to diminishing objections to its observance among the sects by the early to mid-18th Century. R. Meyers, *Celebrations: The Complete Book of American Holidays* 315 (1972). It is clear, however, that the Framers actively participated in official governmental action sanctioning religious observances and activities having a far greater religious impact than the mere display of a creche in the midst of a secular holiday exhibit.

The views of the Framers of the First Amendment are most easily understood by examining legislative proposals offered contemporaneously with the debate and adoption of the First Amendment. For instance, one of the earliest acts of the first House of Representatives was to elect a chaplain. James Madison, sometimes cited as antagonistic toward religion, was a member of the congressional committee that recommended the chaplain system. R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 23 (1982). On May 1, 1789, the House elected as chaplain the Reverend William Linn. Five hundred dollars was appropriated from the Federal treasury to pay his salary.

Washington, as President, issued proclamations calling for observance of Thanksgiving, fasting, and prayer. As a Congressman, Madison endorsed these proclamations. *Id.* at 25-26. Indeed, Congress proposed a joint resolution on September 24, 1789, which was intended to allow the people of the United States an opportunity to thank Almighty God for His many blessings on the American people. *Id.* at 27-29. The resolution requested Washington to announce a day of public thanksgiving and prayer. This proclamation was submitted to the President the very day after Congress had voted to recommend to the states the final text of what was to become the First Amendment to the United States Constitution. President Washington thereafter issued the proclamation. Later, as President, James Madison himself issued four prayer proclamations. *Id.* at 31.

Another notable observance was the divine service that was part of George Washington's inauguration in 1789. By resolution adopted by both houses of Congress it was decided that "divine services" should be held in St. Paul's Chapel in the District of Columbia to be "performed by the

Chaplain of Congress" following administration of the oath of office. P. Stokes and L. Pfeffer, *Church and State in the United States* 87 (Rev. ed. 1964).

Even Thomas Jefferson, who is often cited for his "absolute" commitment to separation of church and state, was not nearly so committed as many who invoke his pronouncements. For example, on October 31, 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians which provided that Federal money be used to support a Catholic priest and build a church for the ministry to the Kaskaskia Indians. The treaty was ratified on December 23, 1803. Explicit appropriation by Congress of funds to support a Catholic priest and a Catholic church could have been avoided by a lump sum appropriation, but Jefferson apparently was not at all reluctant to suggest specific appropriation for a Catholic mission. Cord, *supra,* at 37-39. Jefferson also proposed that religious instruction be offered at the University of Virginia, 19 *The Writings of Thomas Jefferson* 414-17 (Memorial ed. 1904), and served as first president of the school board in the District of Columbia in which the Bible and the Watts Hymnal were used as texts. J. Wilson, *Public Schools of Washington,* 1 Records of the Columbia Historical Society 4 (1897).

The Framers never intended absolute separation of religion and state. Their basic fear was that the Federal government would promulgate a statist ideology and force it upon the citizenry. To say this, however, is not to say that the Framers would have been apprehensive concerning the display of a nativity scene in the midst of a potpourri of well-recognized Christmas symbols. To the contrary, the Framers would have been appalled that the First Amendment could be utilized to prohibit such a practice.

II.

The Court Of Appeals Applied The Wrong Standard Of Review.

It is extraordinary that the Court of Appeals abandoned the traditional tri-partite test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) in favor of the "strict scrutiny" standard found in *Larson* v. *Valente*, 456 U.S. 228 (1982). The latter standard was appropriate in *Larson* because it involved a statute which classified religious organizations and imposed registration and reporting requirements based on "explicit and deliberate distinctions between [such] organizations" *Id.* at 247, n. 23. The Court's "strict scrutiny" analysis, in effect, arose out of an Equal Protection claim involving a suspect classification discriminating among religious groups.

Although "strict scrutiny" may be appropriate for state laws "pregnant with dangers of excessive government direction . . . of churches," *Lemon* v. *Kurtzman*, 405 U.S. at 620, it has no analytical value for this case. The issue here is not whether the City discriminated among or against religions or religious groups, but whether display of a symbol having religious content, in the midst of numerous secular symbols, constitutes an establishment of religion. Cf. *Stone* v. *Graham*, 449 U.S. 39 (1980). The fallacy of applying the *Larson* standard to this type of case is that a "religious discrimination/strict scrutiny" analysis inexorably leads to an adverse result. Even assuming there were a valid governmental interest for displaying a symbol with religious content, it is wholly inconceivable that there could be a "compelling" interest for such a display, let alone "closely fitting" it to further that interest. Indeed, applying strict scrutiny "analysis" to cases involving symbols or ob-

servances would lead to a result clearly rejected by this Court:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Zorach v. *Clauson*, 343 U.S. 306, 312-13 (1952). The same is true for "In God We Trust" on coinage and currency, religious art on stamps, singing carols at Christmas parties in government buildings, and other symbolic displays having some religious content. As Judge Campbell noted in dissent, "constitutional values are [not] furthered by this kind of thinking." *Donnelly* v. *Lynch*, 691 F.2d at 1038.

The proper standard for review here is (1) whether there is a secular legislative purpose for the governmental practice or activity, (2) whether the principal or primary effect of the involvement is one that neither advances nor inhibits religion and (3) whether there is excessive governmental entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Stone* v. *Graham*, 449 U.S. 39 (1980). These standards provide reasoned principles by which the impact of the City's actions can be evaluated and properly account for the fact that the "wall of separation" between church and state is at best a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, 403 U.S. at 614.

III.

The Creche Is Part Of A Cultural-Historical Display Announcing the Christmas Holiday and Does Not Violate the Establishment Clause.

"The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems." *Larkin* v. *Grendel's Den. Inc.*, ___ U.S. ___, 74 L.Ed.2d 297, 304 (1982). Display of the creche in this case does not constitute an establishment of a state religion, nor does it interfere with the practice of religious faiths. The display serves an overriding secular goal of depicting and announcing observance of the Christmas holiday. The religious component of the display represents at most a governmental accommodation, in *de minimus* fashion, of the historical-cultural elements of Christmas as a national holiday.

A. The Creche, As Part Of The City's Christmas Display, Serves A Secular Legislative Purpose.

The City's Christmas celebration and the display in question clearly serve a predominant secular purpose. In context, the creche is one of a group of objects "assembled to show how the American people celebrate the holiday season surrounding Christmas." *Allen* v. *Hickel*, 424 F.2d 944, 949 (D.C. Cir. 1970). Its appearance in the midst of a myriad of other Christmas symbols, some with pagan and some with religious origins, does not constitute state approval or advocacy of religious belief or non-belief. It merely acknowledges the advent of the Christmas holiday as one of many traditional symbols that are part of the heritage of the American people.

The case at bar is remarkably analogous to *McGowan* v. *Maryland*, 366 U.S. 420 (1961). The Sunday Closing Laws in question there had religious origins and in fact contained references to "profan[ing] the Lord's day." The Court nevertheless identified independent secular purposes for such legislation and concluded:

> To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

Id. 366 U.S. 420, 445 (1961).

In *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980), a challenge was raised, in part, to the use of religious symbols as a teaching aid or resource in the public schools. The United States Court of Appeals for the Eighth Circuit upheld rules permitting this practice because the symbols were to be displayed temporarily and only as an example of America's cultural and religious heritage. Although the symbols had a distinct religious content, their use in this context served the secular purpose of advancing "the students' knowledge of society's cultural and religious heritage." *Id.*, 619 F.2d at 1314.

This Court's recent decision in *Stone* v. *Graham*, 449 U.S. 39, is not to the contrary. There, the posting of the Decalogue was found to be "plainly religious in nature" because it was displayed separate and apart from an instructional context and was not properly integrated into the school curriculum. In the case at bar, the creche is positioned in the midst of and as part of a comprehensive display acknowledging in symbolic form the celebration of

the American Christmas holiday and not as an object of veneration, worship or private devotion. As such, its display serves a secular purpose and does not transgress the line separating church and state. *See Allen* v. *Hickel,* 424 F.2d 944 (D.C. Cir. 1970); *Allen* v. *Morton,* 495 F.2d 65 (D.C. Cir. 1973); *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 508 F. Supp. 823 (D.Colo. 1981); *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 526 F. Supp. 1310 (D.Colo. 1981).

B. The Primary Effect Of The Creche, As Part Of The City's Christmas Display, Neither Advances Nor Inhibits Religion.

The primary effect of the City's display of the creche, in the context of the other symbols displayed, is secular. Substantially all of the display of which it is a part contains purely secular symbols. The overall effect of the Christmas display is a secular message that the Christmas holiday is at hand.

The creche, as with secular Christmas symbols such as Santa Claus and reindeer, has been absorbed into the American culture. As such, it represents a traditional aspect of the national history associated with Christmas. "It is seen in department stores, commercial establishments as well as in public places to symbolize the celebration of Christmas, a national holiday." *Allen* v. *Morton,* 333 F. Supp. 1088, 1093 (D.D.C. 1971). In many respects, "the nativity scene has become integrated into our culture and heritage." *See Allen* v. *Morton,* 495 F.2d at 73-74; *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 508 F. Supp. at 828; *Florey* v. *Sioux Falls School District,* 619 F.2d at 1316.

The location and setting of the display in which the creche is a part is also relevant. The display is located on private property. Two major retail establishments are located across streets adjacent to the display. Local merchants, who are dependent on Christmas retail activity, actively support maintenance of the display. The costs associated with the display are insubstantial and no different from those incurred for similar holiday displays. Cf. *O'Hair* v. *Andrus*, 613 F.2d 931, 933 (D.C. Cir. 1979). All of these factors highlight the secular backdrop of the display.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court emphasized the importance of analyzing the overall context of a state practice to determine whether its primary effect is to advance religion. In that case, the State of Missouri argued that use of facilities on the University of Missouri at Kansas City for religious worship and speech violated the Establishment Clause. This Court found that absent evidence of *domination* of university facilities by religious groups, advancement of religion would not be the primary effect of opening facilities for use by all groups. The Court noted that "the provision of benefits to so broad a spectrum of groups is an important index of secular effect" *Id.* at 274. The reasoning of *Widmar* thus highlights that the overall context of a state practice is directly relevant in determining its the primary effect. Here, even with the religious content of the creche, the prevailing message and setting of the Christmas display, and therefore its primary effect, was secular in nature.

The fact that the creche may offend the religious sensibilities of some citizen or citizens does not *ipso facto* imply endorsement by the City of the Christian religion. "While government must be sensitive to the religious beliefs or disbeliefs of its citizens, it is not required to abandon

common sense." *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 508 F. Supp at 830. Taking the overall context of the display into account, the religious impact is greatly diluted, if not emasculated, by the secular elements. The religious impact of the nativity scene is remote and incidental, "significantly subordinated to a predominant secular message of entertainment and nonsectarian celebration." Comment, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education,* 91 Yale L.J. 1196, 1213 (1982).

C. There Is No Entanglement Issue In This Case.

The Court of Appeals itself recognized the weakness of district court's finding of unconstitutional entanglement. It explicitly refused, in its words, "to place much weight on the court's determination that the City's actions risked political divisiveness along religious lines." *Donnelly* v. *Lynch,* 691 F.2d at 1035. Political divisiveness, alone, does not form a basis to invalidate governmental action involving religious activity. *Id.* Moreover, divisiveness on religious lines is not intensified by the Christmas display itself because of its primarily secular nature. *See Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 526 F. Supp. at 1315. Most important, there is a notable absence of relationships or continuing contacts between the City and religious groups that could cause the administrative entanglement concerns found in *Allen* v. *Morton,* 495 F.2d 65 (D. C. Cir. 1973). In sum, the case is free of any entanglement concerns.

CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism,* 8 Ohio N.U.L.Rev. 329 (1981). The mind frame of those who directed the constitutional era and the drive toward separation of church and state "was, in some respects, anti-clerical, as a result of Papism, Cromwellism, etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution—A Middle Way,* 23 Loyola L.Rev. 617, 632 (1977).

The Framers sought to avoid the kind of hostility found in this case by accommodating the religious interests of the people. There was no intention on the part of the Framers to censor or eradicate religion from public life. And such has never occurred. The rule of separation that the Framers had in mind when they drafted the First Amendment was to be implemented in a climate of accommodation and benevolence, not of hostility toward religion.

The Court of Appeals' decision runs contrary to this central historical and political truth. It is, as the dissent points out, "an act of censorship against the holiday itself." *Donnelly* v. *Lynch,* 691 F.2d at 1038, n.1 (Campbell, J. dissenting). It amounts to a *de facto* establishment of what this Court has previously identified as a "religion of secularism." *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 225 (1963). *See also* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development,* 81 Harv. L.Rev. 513, 586-587 (1968) and *Torcaso* v. *Watkins,* 367 U.S. 488, 495, n.11 (1961). As Harvard professor Harvey Cox has noted, secularism is an "ideology, a new closed world view which functions very much like a new

religion. . . . It is a closed ism." H. Cox, *The Secular City* 18 (1965). It is a menace to freedom because it "seeks to impose its ideology through the organs of the State." *Id.*

Not only is the reasoning of the lower courts a departure from long-standing First Amendment values, it is fallacious on its face. The courts below would outlaw official "display" of an ancient symbol depicting the historical and religious roots of the Christmas holiday, but would permit official "observance" of the holiday itself, named for and commemorating the birth of Jesus Christ. This logic is not only specious, it produces an absurd result. As Judge Leventhal observed in *O'Hair* v. *Andrus*, 613 F.2d at 937, "[t]he Establishment Clause is not an abstraction in logic. It permits an accommodation in furtherance of the spirit and purpose of the First Amendment."

Here, the City of Pawtucket did nothing more than accommodate, in *de minimus* fashion, the cultural-historical-religious elements of America's past in the celebration of Christmas—following similar practices common worldwide. As Kauper has noted, by way of such accommodation governments are "contributing to religious freedom and making it more meaningful." P. Kauper, *Civil Liberties and the Constitution* 10 (1962).

When the people of Rhode Island ratified their Constitution, they echoed the religious beliefs of the Framers of the Federal Constitution. In their preamble they proclaimed:

> We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same unimpaired to succeeding generations do ordain and establish this constitution of Government.

B. Weiss, *God and America's History: A Documentation of America's Religious Heritage* 202 (Rev. ed. 1975). In ratifying the Bill of Rights, their descendants never imagined that one day the United States Constitution could be argued in such a manner as to limit the display of the faith they proclaimed, much less prohibit a city-sponsored seasonal, cultural display on private property that included a nativity scene.

The decision of the Court of Appeals blatantly conflicts with both the intentions of the Framers of the First Amendment and with fundamental constitutional principles. It is, therefore, essential that the conflict be resolved in favor of the petitioners.

Respectfully submitted,

JOHN W. WHITEHEAD
JAMES J. KNICELY
Participating Attorneys for
The Rutherford Institute
P. O. Box 510
Manassas, Virginia 22110

Attorneys for Amici Curiae

Coalition for Religious Liberty
5555 North Federal Highway
Ft. Lauderdale, Florida 33308

The Freedom Council
P. O. Box 64323
Virginia Beach, Virginia 23464